IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army,
Appellants,

v.

HOWARD B. LEVY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the opinion and order of the court of appeals be affirmed or the appeal be dismissed on the grounds that appellants did not properly effect an appeal in compliance with the rules of this Court, that the questions presented warrant no further argument, and that other grounds raised by appellee below but not relied upon by the court of appeals justify the decision below.

STATEMENT

Appellee, Dr. Howard B. Levy, formerly a Captain in the United States Army, entered active duty on July 9, 1965. He was assigned to the United States Army Hospital, Fort Jackson, South Carolina, as Chief of Dermatology.

On September 10, 1965, appellee wrote an eight-page letter expressing his views on American foreign and domestic policy to a sergeant then stationed in South Viet Nam.[1]

During the year 1966, Dr. Levy engaged in private and informal conversation with army personnel, enlisted men and officers, expressing disagreement with American foreign policy in general and Vietnamese policy in particular. He critically discussed what he believed to be national policy regarding the rights of black citizens. Dr. Levy was accused in Additional Charge I of stating to Special Forces personnel, other personnel under his supervision, and patients, that he considered Special Forces personnel "liars and thieves," "killers of peasants," and "murderers of women and children." He was also accused of stating that "the

[1] The two charges relating to the letter were reduced to lesser included offenses by the court-martial and, following their reduction, were dismissed on June 3, 1967. These specifications, Additional Charges II and III, are found at Jurisdictional Statement Appendix, p. 4a, n. 1.

The five charges were as follows:

Charge I – Article 90 (disobedience of order)

Charge II – Article 134 (General Article)

Additional Charge I – Article 133 (conduct unbecoming an officer and a gentleman)

Additional Charge II – Article 133 (conduct unbecoming an officer and a gentleman – dismissed at conclusion of court-martial)

Additional Charge III – Article 134 (General Article – dismissed at conclusion of court-martial).

United States is wrong in being involved in the Viet Nam War," that he would not serve in the war if ordered, and that "colored soldiers" were discriminated against and should not serve in the war. His words were described in Additional Charge I as being "intemperate," "defamatory," "provoking," "disloyal," "contemptuous" and "disrespectful." In Charge II it was charged that he did, "with design to promote disloyalty and disaffection among the troops, publicly utter . . . statements to divers enlisted personnel at divers times" "which statements were disloyal to the United States, and prejudicial to good order and discipline in the armed forces."

On October 11, 1966—following visits from a special counter-intelligence agent to his commanding officer—Dr. Levy was ordered to train Special Forces Aidmen in dermatology, his medical specialty. Although he had trained all other military medical and para-medical personnel in dermatology, he declined on ethical grounds to provide Special Forces personnel the ten hours training sought. He contended these men were combat soldiers rather than Geneva Convention-protected and Army-defined medical personnel and that they were using medicine in Viet Nam for political and military rather than medical purposes.

Dr. Levy's commanding officer initiated Article 15, 10 U.S.C. §815, non-judicial punishment proceedings against him. He upgraded those charges to general court-martial level after reading and re-reading a G-2 dossier compiled on Dr. Levy and called to his attention by James B. West, Special Agent of the Counter Intelligence Corps, who resided in nearby Prosperity, South Carolina, where Dr. Levy had in his off-duty, out-of-

uniform hours engaged in a Negro voter registration drive.

Dr. Levy was tried for "conduct unbecoming an officer" and for violating the "General Article", Articles 133 and 134 Uniform Code of Military Justice, hereinafter UCMJ, 10 U.S.C. §933, 934, as well as for disobeying an order, Article 90, UCMJ, 10 U.S.C. §890.[2] Four of the five charges against Dr. Levy were based on pure speech, no conduct being alleged or proved. The fifth was based on his failure to obey the order to train Special Forces personnel.

On June 3, 1967, Dr. Levy was convicted by court-martial, sentenced to dismissal from the service, forfeiture of all pay and allowances and three years imprisonment at hard labor.[3]

He exhausted his military review procedures[4] and then filed in the federal district court a petition for a writ of habeas corpus. It was denied on June 30, 1971.[5]

[2] The Article 90 Charge, Charge I, is found at Jurisdictional Statement Appendix, p. 2a. Charge II and Additional Charge I are set out in the appendix to this motion, p. 1a. *infra.*

[3] On August 2, 1969, Mr. Justice Douglas ordered appellee released on bail pending habeas corpus. Levy v. Parker, 396 U.S. 1204 (1969). On October 13, 1969, this Court unanimously agreed. Levy v. Parker, 396 U.S. 804 (1969).

[4] United States v. Levy, C.M. 416, 463, 39 C.M.R. 672 (1968), *petition for review denied*, No. 21, 641, 18 U.S.C.M.A. 627 (1969). Other proceedings are reported as follows: Levy v. Corcoran, 389 F.2d 929 (D.C. Cir. 1967), *stay and cert. denied*, 387 U.S. 915, 389 U.S. 960 (1967) (sought to enjoin conduct of court-martial); Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); Levy v. Resor, Civ. No. 67-442 (D.S.C. July 5, 1967), *aff'd per curiam*, 384 F.2d 689 (4th Cir. 1967), *cert. denied*, 389 U.S. 1049 (1968) (sought bail pending intra-military appellate review); Levy v. Dillon, 286 F. Supp. 593 (D. Kan. 1968), *aff'd.*, 415 F.2d 1263 (10th Cir. 1969) (regarding post-trial relief while incarcerated at United States Disciplinary Barracks pending intra-military appellate review).

[5] See Jurisdictional Statement Appendix pp. 98a-103a.

An appeal of the denial of the habeas corpus was filed in the United States Court of Appeals for the Third Circuit. On April 18, 1973, the court of appeals reversed the district court holding Articles 133 and 134 unconstitutional and reversing the Article 90 charge for prejudicial joinder. It ordered

> the cause [is] remanded for the purpose of issuing the writ of habeas corpus unless within ninety days of the date hereof the appropriate military authorities shall grant to Howard B. Levy a new trial on the Article 90 charge, in accordance with the opinion of this Court.
>
> Jurisdictional Statement Appendix, pp. 96a.[4]

I

THE APPEAL SHOULD BE DISMISSED BECAUSE THE GOVERNMENT'S NOTICE OF APPEAL WAS NOT FILED BY OR ON BEHALF OF COUNSEL FOR APPELLANTS AND FAILED TO COMPLY WITH THE SERVICE RULE OF THIS COURT.

Rule 16.1(a), Revised Rules of the Supreme Court of the United States provides:

> The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules.

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[4] The mandate of the court was duly entered on May 10, 1973. On July 13, 1973, the Government moved in the court of appeals to stay that portion of the court's mandate which required that Dr. Levy be granted a new trial within 90 days or the writ issue until such time as this Court could act on the appeal. Over objection of appellee, the court below ordered its mandate recalled (since the mandate had already issued) and stayed as requested provided the Government's appeal be docketed by July 30, 1973.

[4] Order of July 26, 1973.

The Government's notice of appeal is found at Jurisdictional Statement Appendix, pp. 105a, 106a. As it recites, service was accomplished by mailing copies of the notice to counsel for appellee by first class mail. It was certified by Carmen C. Nasuti, Assistant United States Attorney at Philadelphia, Pennsylvania. The only counsel names appearing on the notice and certificate of service are those of Nasuti and Robert E. J. Curran, United States Attorney.

The notice of appeal, filed with the clerk of the United States Court of Appeals for the Third Circuit was required to be served by Rule 10.2, Revised Rules of the Supreme Court of the United States, and to be served in the manner prescribed by Rule 33, Revised Rules of the Supreme Court of the United States.[7] The notice and service are deficient in two respects.

(a) The notice was filed by and/or on behalf of Curran and Nasuti. Since neither at the time of filing was counsel of record, and since the record reveals no entry of appearance by said attorneys, Rule 33.4 renders the filing ineffective to give appellee notice that any appeal has been filed.[8] The filing by legal strangers to this litigation was insufficient.

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[7] Relevant parts of Rules 10 and 33, Revised Rules of the Supreme Court of the United States, are set out in the appendix to this motion, p. 4a, *infra*.

[8] Any doubt that the entry of appearance is required, even though the required notice is filed with the clerk of the court of appeals, is removed by the second sentence of Rule 33.3(b): "If counsel [a member of the bar of the Supreme Court of the United States] certifying to such service has not up to that time entered his appearance in this court in respect to the cause in which such service is made, his appearance shall accompany the certificate of service *if the same is to be filed in this court.*" (Emphasis added.) Rule 33.4 thus applies to counsel who files or has filed on his behalf a document in any court required to be filed by Supreme Court rules.

(b) The person effecting service, Nasuti, was not at the time of filing a member of the bar of this Court.[9] Since Rule 33.3(b) allows only a member of the bar of this Court to certify service, whereas others must file an affidavit of service, Rule 33.3(c), Nasuti was required to file the latter. This was not done.[10] The requirement of Rule 33 of proof of service was not met.

Because of appellants' failure to file an effective notice of appeal, this Court lacks jurisdiction and the case should therefore be dismissed.[11]

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[9] Counsel for appellee have been so informed by the Clerk's office of this Court.

[10] The record will reflect that there was no effort to complete proof of service by acknowledgment of service pursuant to Rule 33.3(a).

[11] Were it not for the lack of jurisdiction outlined above, there would be substantial question as to whether a valid appeal could be taken from the court of appeals under 28 U.S.C. §1252. Although the statutory language, "any court of the United States," is broad, the statute was intended to provide quick review from district court decisions. Stern & Gressman, SUPREME COURT PRACTICE (4th Ed.) §2.5, p. 31. No alternative quick review other than petition for certiorari is necessary from court of appeals judgments. An indication that Congress did not intend §1252 to be used as the Government here attempts is that there is no procedure for granting stays of judgment by inferior courts pending appeal from courts of appeals. A district court has power to stay judgments pending appeal. *E.g.*, Rule 62, Federal Rules of Civil Procedure, and a court of appeals may grant stays pending appeals to it. *E.g.*, Rule 8, Federal Rules of Appellate Procedure. But the appellate courts may stay only their own mandates pending petitions for certiorari, Rule 41(b), Federal Rules of Appellate Procedure, not appeals. Thus, despite the court below granting a stay citing Rule 18.1 of this Court, which means only that this Court will honor lower court stays but grants no power to grant such stays, Congress has provided no method for stays pending appeals from courts of appeals by said courts. This vacuum could not have been intended. The only rational conclusion is that there can be no such appeals. Review can be adequately had by petition for certiorari.

II.

DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS SO OBVIOUSLY CORRECT AS TO WARRANT NO FURTHER REVIEW.

A. Articles 133 and 134 Are Unconstitutional Because They are Void for Vagueness.[12]

The court of appeals viewed the due process question with an eye to *O'Callahan v. Parker*, 395 U.S. 258, 265-66 (1968), and concluded that this Court "has invited the federal courts to reexamine this due process question in the context of current constitutional teachings." Jurisdictional Statement Appendix, p. 31a. The court of appeals compared the ever-growing number of offenses cognizable under Article 134 with the basic concept of *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926), that:

> a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . .[13]

And, statutes must:

> employ words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, . . .[14]

This Court has characterized Article 134 as an example of ". . . harsh law which is frequently cast in very sweeping and vague terms." *Reid v. Covert*, 354 U.S. 1,

[12] The court of appeals spoke of vagueness The rationale of the opinion clearly encompassed overbreadth as well and will be treated as such.

[13] Jurisdictional Statement Appendix, pp. 31a, 32a.

[14] *Id.*, p. 32a.

38 (1957). In a long series of cases this Court has recognized the primacy of the first amendment and has resisted incursions of vague and overly broad statutes upon the area it protects. *E.g., NAACP v. Button*, 371 U.S. 415 (1963); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

The court of appeals said:

> The most recent articulation of the vagueness doctrine, representing a synthesis of past teachings, is found in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972):
>
> > It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (Citations omitted.)

> Failing to pass constitutional muster have been statutes penalizing "misconduct," *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); conduct that was "annoying," *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); "reprehensible," *Giaccio v. Pennsylvania*, *supra;* and "prejudicial to the best interest" of a city, *Gelling v. Texas*, 343 U.S. 960 (1952). Other federal courts have voided prohibitions of conduct that "reflects discredit," *Flynn v. Giarrusso*, 321 F. Supp. 1295 (E.D. La. 1971); or is "offensive," *Oestreich v. Hale*, 321 F. Supp. 445 (E.D. Wis. 1970). (Footnote omitted.)
> Jurisdictional Statement Appendix, pp. 32a, 33a.

The court of appeals framed the issues thusly:

> Do Articles 133 and 134 give to a commissioned officer of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute? Do these articles encourage erratic arrests and convictions?
> Jurisdictional Statement Appendix, p. 34a.

The answer to these questions required reversal.

The Government erroneously contends that the court of appeals "conceded . . . the conduct engaged in by Captain Levy fell unequivocally within the scope of certain specific examples set forth in the [UCMJ] *Manual's* description of conduct proscribed by Article 134 (App. A, *infra*, pp. 46a, 73a)." Jurisdictional Statement, p. 12. What the court of appeals actually said was:

> Neither are we unmindful that the *Manual for Courts-Martial* offers as an example of an offense under Article 134, "praising the enemy, attacking the war aims of the United States, or denouncing our form of government." With the possible exception of the statement that "Special Forces are liars

> and thieves and killers of peasants and murderers of women and children," it would appear that each statement for which appellant was court-martialed could fall within the example given in the *Manual*. Jurisdictional Statement Appendix, pp. 45a, 46a.[15]

The "possible exception" statement, of course, accompanied by those contained in the dismissed letter charges, was the key inflammatory statement, most likely to instill prejudicial reaction and affect the verdict. The Government's glossing over the lower court's refusal to hold that all the statements were within the example sidesteps the clear pronunciations of this Court that when a conviction is obtained under a general statute prohibiting several matters, one of which is constitutionally permissible, the conviction cannot stand. *Street v. New York*, 394 U.S. 576, 588 (1969); *Terminiello v.*

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[15] At the court-martial, Dr. Levy sought to prove truth as a defense to this pure speech charge. The law officer ruled truth was not a defense.

> LAW OFFICER: The accused's *statements* as alleged, again, *are basically expressions of opinion whose truth or falsity is hardly relevant*. The inquiry in this case is and must be not their truth or falsity, but were these statements uttered with a design to promote disloyalty, and did they have a reasonable and natural tendency to do so.
> R. Vol. 5, p. 876 (Emphasis added.) ["R" cites are to the military record introduced as exhibits below.]

> INDIVIDUAL COUNSEL [Mr. Morgan]: Now, but I'm trying to ascertain—really to just get down to an instance, a position here, and that is that the question of objective truth doesn't matter, and consequently *if objective truth were spoken and totally disrupted the Armed Forces, but what was said was true, a person would not be entitled to make those statements.*
> LAW OFFICER: *Not as long as that Army won, I suppose.*
> R. Vol. 5, p. 884. (Emphasis added.)

The refusal to allow the defense mandated by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Garrison v. Louisiana, 379 U.S. 64 (1964), clearly warrants reversal. *See*, Whelchel v. McDonald, 340 U.S. 122 (1950).

Chicago, 337 U.S. 1, 6 (1949); *Stromberg v. California*, 283 U.S. 359, 369-70 (1931); *Thomas v. Collins*, 323 U.S. 516, 529 (1945). Since all of Levy's statements clearly do not fit within the *Manual's* example the Government misstates an argument which is in any event irrelevant since when first amendment defense of overbreadth is raised, the fact that the charged speech falls within the statutory prohibition does not prevent the accused from raising the defense. *E.g.*, *NAACP v. Button*, 371 U.S. 415 (1963).[16]

The ever growing number of offenses cognizable under Article 134 and the history of prosecutions led the court of appeals to term it "an unwritten criminal code, a catchall receptacle." Jurisdictional Statement Appendix, p. 36a. Disputing the rationale of *United States v. Frantz*, 2 U.S.C.M.A. 161 (1953), the court of appeals pointed out that the listed specifications fail to outline "with exactitude and limitation that conduct proscribed by Article 134." *Id.*, p. 37a. ". . . Article 134 is open ended." *Id.* That court of appeals pointed out that there is no unifying theme to the specifications, they comingle civilian offenses against persons, morals, and property with military offenses against, *e.g.*, the wearing of improper uniforms or firearms and military

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[16] The Government insists that the court of appeals "brushed aside" the issue of Levy's standing to assert vagueness. Of course the court below merely relied on Coates v. Cincinnati, 402 U.S. 611, 616 (1971); Gooding v. Wilson, 405 U.S. 518, 520 (1972); NAACP v. Button, 371 U.S. 415, 433 (1963). Jurisdictional Statement Appendix, pp. 45a-47a. The Government's difficulty is that it seeks to apply *conduct* statutes to pure speech, and cannot refrain from terming Dr. Levy's speech "conduct." See Jurisdictional Statement, p. 13. But speech remains speech, and protected by the first amendment.

relationships. It quoted *United States v. Reese*, 92 U.S. 214, 221 (1876):

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be at large.
> *Id.*, p. 39a.

The vice of the General Article's invitation to assert criminal liability virtually without limitation is compounded by Executive rather than legislative drafting of the *Manual* and military adjudication of the charges brought under it.

Additionally, the court of appeals found it was unable to ascertain any Article 133 ("conduct unbecoming an officer and a gentleman") standard by which an officer could measure his conduct. *The Manual's* discussion of proscribed conduct, Jurisdictional Statement Appendix, pp. 34a, 35a, n. 24, has remained unchanged since 1886. *Id.*[17] The court felt "far from satisfied" that the charge "replete with its capacity for subjective interpretation" satisfied due process standards. Jurisdictional Statement, p. 35a.

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[17] The law officer's instructions to the court substantially followed the *Manual*, para. 212; the key words being:

> action or behavior in an official capacity which, in *dishonoring or disgracing the individual* as an officer, seriously compromises his character as a gentleman. . . . [T]he act . . . *must have a double significance* and effect . . ., it *must offend so seriously* against justice, law, morality or decorum as to *expose to disgrace*, socially, or as a man, the actor. *Additionally*, the act must . . . *bring dishonor or disrepute upon the military profession* which he represents. *Further*, unbecoming . . . mean[s] not merely inappropriate or unsuitable, as being opposed to good taste or propriety, or not consonant with usage, *but morally unbefitting and unworthy*. (Emphasis added.)
> R. Vol. 9, p. 2597.

[footnote continued on next page]

Regardless of whether Articles 133 and 134 are constitutionally infirm, Levy's conviction would still be invalid because of the specifications on "disloyalty" and "disaffection." Despite the Government's contention that the disloyalty specification solves the due process problem –

> Had Captain Levy desired to evaluate the lawfulness of his course of conduct, a short glance at the *Manual* would have resolved any doubts he might have entertained from a reading of the statutory provisions he attacks.
> Jurisdictional Statement, p. 12.

– it fails to cite the Court to *Stolte v. Laird*, 353 F. Supp. 1392 (D.D.C. 1972), which held disloyalty specifications facially unconstitutional. The Government did not appeal. After repeated requests from defense counsel, the law officer held an out of court hearing in which he defined both "disloyalty" and "disaffection" using such words as "unfaithful," "disgust," or "discontent," and

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Dr. Levy, in his official capacity, must have so "dishonored" or "disgraced" himself that his own character was seriously compromised. But the witnesses had praise for his character. *E.g.*, R. Vol. 7, 2342-51. The record is barren of evidence to the contrary.

Also, he must so seriously have offended "decorum" as to disgrace himself as a man. Here again, there is no proof. No offense against "law," "justice" or "morality" is alleged or raised by the proof. Indecorum cannot be constitutionally prohibited. See *e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966) (three-judge court), but it is the only one of the four words that the specification under this charge could conceivably refer to.

Additionally, he must have brought "dishonor or disrepute upon the military profession which he represents." The prosecution offered no evidence that the Army had suffered any loss of public esteem because of Dr. Levy's statements.

Further, he must have offended not merely "good taste or propriety," but must have been "morally unbefitting and unworthy."

"ill will" (and with respect to "disaffection," the word "disloyalty").[18] It is submitted that no one—not even the law officer and the lawyers, let alone Dr. Levy and the men who judged him—understood the charges.

B. The "Centuries Old" Argument Is Of No Value In This First Amendment-Due Process Prosecution. Retroactivity And "Profound Disruption" Are Not At Issue Here.

The Government's "centuries old" statute argument is misleading, since, as Mr. Justice Clark said, "[N]ot until 1951 did the disloyalty charge . . . become a badge of infamy within reach of the *Manual*." *Avrech v. Secretary of the Navy*, 477 F.2d 1237, 1241 (D.C. Cir. 1973) jurisdictional statement filed *sub nom. Secretary of the Navy v. Avrech*, 41 U.S.L.W. 3674 (No. 72-1713, June 18, 1973).[19]

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[18] The law officer continued:

> Now here again, that is just a broad general statement, and I may not define those terms for the court in those terms because I am not satisfied with them myself. R. Vol. 7, p. 2191.

And when the court was charged, the law officer told the members that "disloyalty"

> imports not being true to or being unfaithful to an authority to whom respect, obedience or allegiance is due and tending toward insubordination, refusal of orders, or mutiny. The term "disaffection" imports disgust and discontentment, ill will, disloyalty and hostility, toward an authority to whom respect, obedience, and allegiance is due." R. Vol. 9, p. 2596.

[19] An additional ground for affirmance was the "public utterance" part of the crime. Although the Jurisdictional Statement, p. 7, attempts to paint a picture of Dr. Levy talking to everyone in his "crowded and busy clinic", the Government after submitting 450 questionnaires to the clinic's 17,500 patients could find only 13 witnesses who heard anything relevent. Although charged with "public utterance", the charge did not require this to find guilt. R. Vol. 9, p. 2594. Dr. Levy mounted no soap box, but the law officer's definition of "public", R. Vol. 9, p. 2596, would render

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The Government's reliance on *Smith v. Whitney*, 116 U.S. 167 (1886), and *Dynes v. Hoover*, 61 U.S. [20 How.] 65 (1858), is of little value. The court of appeals noted that this Court's interpretation of the due process of law has been radically altered since the nineteenth century. *See*, Jurisdictional Statement Appendix, pp. 30a, 44a-47a. And as Mr. Justice Clark said in *Avrech v. Secretary of the Navy*, *supra*, 477 F.2d at 1242,

> the old authorities cited bear little weight. Not only has the General Article been expanded beyond recognition, but the greater percentage of our armed forces are today non-career personnel. They are draftees or enlisted personnel with little military experience. Even the "old soldiers" themselves say that the language in Article 134, judged by the void-for-vagueness cases is 'unduly indefinite.' (Citations omitted.)

The court of appeals began its examination of the articles "mindful of Justice Holmes' sage admonition [*Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)], '[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case of the Fourteenth Amendment to affect it." Jurisdictional Statement Appendix, p. 22a.[20] In addition to the case *sub judice*, the only other cases to address the issues, *Avrech v. Secretary of the Navy*, *supra* (Article 134), and *Hooper v. Laird*, ...F.2d..... (D.C. Cir.

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meaningless the right of a military officer to run for public office as guaranteed by A.R. 600-20, para. 42. He can only do so "privately and secretly." *Id.*

[20] Mr. Justice Holmes spoke of putting walls between two plots of land. We deal here with criminal statutes, and the "common consent" of the accused or even his possible knowledge of the proscribed speech is beyond ken.

1973) (No. 72-1198, decided August 3, 1973) (Articles 133 and 134), have found that the due process of law overrides historical reticence.[21]

The Government's second substantiality argument is that the decision below "would create a profound disruption of the orderly administration of justice within the military." Jurisdictional Statement, p. 10. But, despite the Government's effort to draw the issue of retroactive application into this case, retroactivity is not an issue here. It seems to argue that despite the unconstitutionality of the statutes, the military must be permitted to enforce them since, if they are unconstitutional, this Court might apply such a holding retroactively and that would cause profound disruption.

Further the argument that "there are substantial areas of misconduct", *id.*, that the military must control but that are not specifically covered by the UCMJ because they were considered covered by Articles 133 and 134 fails to state a substantial argument.[22] It is not for this Court to weigh against the Constitution the military's alleged problem with "a substantial and serious gap in

[21] The three courts of appeals panels which have held Articles 133 and 134 unconstitutional (all three panels considered and struck down Article 134, two of the three considered and struck down Article 133) have done so unanimously. Circuit Judge Seitz joined in the court below's disposition of Articles 133 and 134. Jurisdictional Statement Appendix, p. 84a. The *Hooper* decision was a *per curiam* opinion joined in by Circuit Judge Tamm. Judge Tamm had originally joined in a two member majority which denied Dr. Levy an injunction to prevent his trial by court-martial. Levy v. Corcoran, 389 F.2d 929 (D.C. Cir. 1967), *stay and cert. denied*, 387 U.S. 915, 389 U.S. 960 (1967).

[22] As Judge Robinson noted in Stolte v. Laird, 353 F. Supp. 1392, 1399, n. 26 (D.D.C. 1972), ". . . the military is well known for its ability to promulgate detailed regulations on many subjects much less important than the First Amendment."

the military justice system." *Id.* It is fully within the capability of the legislative branch to fill any gaps in the military justice system.

The court of appeals clearly was correct in concluding that the vague articles denied Dr. Levy the due process of law.

III.

THE FREE SPEECH CHARGES VIOLATED THE FIRST AMENDMENT

This appeal should be affirmed because Articles 133 and 134, even if constitutional, were unconstitutionally applied to speech.

The district court found that "the record supports a finding of a clear and present danger of creating the harmful results, with the requisite intent, as charged . . ." Jurisdictional Statement Appendix, p. 100a. The court of appeals never reached the issue. But, the law officer's charge to the court-martial set forth a *clear and reasonable tendency* test rather than a clear and present danger test. The law officer's charge was that the words should be judged by their "clear and reasonable tendency to promote disloyalty and disaffection." R. Vol. 9, p. 2594.[23]

The Government made no attempt to demonstrate military necessity or a rational or a compelling reason for the speech prosecution of Dr. Levy. First amendment incursions require a showing of an ". . . over-

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[23] There was no test at all for Additional Charge I, the Article 133 charge on which conviction was had. On the Article 134 charge, the law officer did use the phrase "clear and present danger" in charging a "*lesser* included offense." R. Vol. 9, p. 2595.

riding and compelling state interest," *DeGregory v. New Hampshire*, 383 U.S. 825 (1966), a military necessity which must be "striking," Warren, The Bill of Rights and the Military, 37 *N.Y.U.L. Rev.* 181 (1962), for the amendment ". . . exacts obedience even during periods of war." *Dennis v. United States*, 341 U.S. 494, 520 (1951) (concurring opinion). There was no finding that at the Fort Jackson, South Carolina, Dermatology Clinic ". . . an immediate check is required to save the country." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Cohen v. California*, 403 U.S. 15 (1971).

Despite the district court's summary conclusion, there was no finding at the court-martial of a "clear and present danger" of anything, nor were any "harmful effects" shown to have occurred or existed, let alone to have been a crime. To sustain such convictions would go far beyond what was permitted in *Dennis*, and such efforts have been consistently rejected by this Court.

IV.

THE ARTICLE 90 CHARGE SHOULD REMAIN REVERSED REGARDLESS OF THE DISPOSITION OF THE OTHER CHARGES[34]

The court of appeals noted that the inflammatory evidence most calculated to disturb the court-martial

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[34] If this Court does note probable jurisdiction, Dr. Levy is prepared to argue that the order required him to violate first amendment protected medical ethics. Dr. Levy was convicted for failing to teach his art to combat troops (Special Forces Aidmen) who, unlike medical corpsmen, are not covered by the Geneva Convention and who would have no medical supervision in Viet Nam.
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R. Vol. 19, p. 51; R. Vol. 5, pp. 941-44, 963-69. This directly conflicted with the Oath of Hippocrates. R. Vol. 6, p. 2083. That oath also required Dr. Levy to keep the confidences of his patients. Dr. Levy proved that patients (including military dependents) brought to his clinic were exposed to combat troop-Aidmen without their consent when he was not there to prevent it. R. Vol. 6, p. 1098. And even though Army Regulation 40-554, par. 5, and Technical Bulletin T.B.Med. 230, Treatment and Management of Venereal Disease, 7 July, 1965, §53d(2) prohibits the disclosure of confidential information to non-medical or health agencies, the law officer refused to instruct the court that if it found that Special Forces was not a medical or health agency and the combat troop-Aidmen would have learned the identity of venereal disase contacts then the order was unlawful. R. Vol. 18, App. Exh. 24. Dr. Levy's ethical practice was protected by the first, third, fourth, fifth, and ninth amendments. Griswold v. Connecticut, 381 U.S. 479 (1965); especially may he so defend his action, since the proof showed eight or ten combat troop-Aidmen entered an examination room without the consent and over the objections of a disrobed female patient. R. Vol. 6, p. 1098.

The Presumption that the order was lawful, embodied in the Manual for Courts-Martial, para. 169b, p. 321, is a shift of the burden of proof to the accused by the Executive. This Court has not hesitated to strike down such presumptions made by Congress where they violated the Constitution. Morissette v. United States, 342 U.S. 246, 275 (1952). *Compare*, United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965).

Additionally, the court of appeals decided only that it would not disturb the court's finding that the order was not intended solely to punish. Of course, that was the only defense cognizable under the Manual, par. 169b, p. 321. But Dr. Levy's defense was not limited to the fact that the order was issued at a time when it was known that he would not obey it. R. Vol. 2, pp. 1, 2; R. Vol. 12, App. Exh. 2, p. 10; R. Vol. 13, pp. 540-566; R. Vol. 3, pp. 219-89.

The prosecution of Dr. Levy was selective enforcement, initiated because a Jewish doctor from Brooklyn chose to join a voter registration drive in a small South Carolina county rather than the officers' club. Within two days of his initial off-post off-duty out-of-uniform civil rights activity, someone entered in his G-2 dossier: "Determine whatver [sic] loyalty investigation should be made 19 July 1965." R. Vol. 15, p. 315. A retired special agent of a counter-intelligence corps who lived in that county pushed the investigation, and was extremely interested in Dr. Levy's alleged interest in dating

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members was introduced under the Articles 133 and 134 charges, and most of this "would have been inadmissible under the Article 90 charge. . . ." Jurisdictional Statement Appendix, p.5 4a. It said, "We find, with some facility, that Levy was prejudiced by the admission of evidence on the Articles 133 and 134 charges; in any event, there undoubtedly existed a reasonable possibility that he was prejudiced." *Id.*, p. 56a.

The court of appeals said it was left to speculate as to what course the trial might have followed if Dr. Levy had been charged only under Article 90.

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Negroes. R. Vol. 12, pp. 40-41, R. Vol. 14, p. 635. Agent West's reports showed he was far more interested in Dr. Levy's dating habits than in Dr. Levy's statements about voting, the first amendment, or the Constitution. R. Vol. 14, p. 705. The charges were preferred by an officer who feared a "communist" or "pinko" had been let loose in his command. The claim that Dr. Levy spoke "to colored soldiers who were young and immature," (from the Staff Judge Advocate's review) R. Vol. 19, p. 134, "many of whom emotionally and educationally were susceptible to being influenced," (from the Board of Review opinion) United States v. Levy, 39 C.M.R. 672 (1968), embodies the assumption that Negro males are childlike. See, G. Myrdal, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY, 103 (1944).

Agent West's ideas still cling, for the Government still argues, albeit inaccurately, that the statements were made "to enlisted personnel, most of them black. . . ." Jurisdictional Statement, p. 6. The specialist assigned to Dr. Levy's clinic, a prime prosecution witness, could recall only that Dr. Levy talked to about two Negro patients on one occasion only, out of 17,500 patients. R. Vol. 14, p. 732. And from 450 questionaires the Government sent to Dr. Levy's patients, only 13 were called as witnesses.

The prosecution was upgraded after the officer who preferred charges was visited by Agent West and provided a G-2 dossier, portions of which have been denied to Dr. Levy and his civilian counsel, but which were provided his military counsel under a mandate of secrecy.

> Under such circumstances, we cannot reach the legal conclusion that Captain Levy was not prejudiced by having the court told explicitly that he had called Special Forces personnel "killers of peasants," and "murderers of women and children," had told enlisted men "they should refuse to go to Viet Nam," and had written, "Is Communism worse than a U.S. oriented government? . . . I doubt it." We are unable to reconstruct by hindsight on the basis of reasonable predictability of human behavior, a jurisprudential setting in which a fact-finding panel of military officers could have been immunized, in theory or in fact, from the inflammatory effect of such statements derogating the very military apparatus which the fact-finders were sworn to defend and protect. *Id.*, pp. 57a, 58a.

Indeed to assume that the ten career officers who were Levy's court-martial[25] could have been so immunized would run contrary to all we know of human nature.[26]

The court continued:

> This being so, we turn to the teachings of *Kotteakos* [*v. United States*, 328 U.S. 750 (1946)]: "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not

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[25] All members of the court were career infantry officers ranging in rank from major to colonel; eight were caucasian; eight were Southerners; four had served in Viet Nam, one losing an eye there.

[26] The court of appeals noted that the military court followed the law officer's instructions. Jurisdictional Statement Appendix, p. 57a. The dissent argued that this was reason for affirming the Article 90 charge. *Id.*, p. 92a. But one reason this Court reversed in Kotteakos v. United States, 328 U.S. 750, 767 (1946) was that the trial court itself was confused. If there is any doubt that the law officer was confused as to what the offenses and their elements were one need only read his charge to the court, R. Vol. 9, pp. 2589-2608.

> substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S. at 765. We are left in grave doubt. *Id.* p. 58a.

The prejudice to Levy was not limited to the placing of his political opinions before the court. The motion for severance was based on the existence of a direct variance in the charges. For example, regarding Charge I, the Article 90 charge, the law officer said at the trial:

> LAW OFFICER: If I follow you correctly, the evidence presented on the disobedience of the order in Charge I had nothing to do with the—necessarily, with the other specifications and charges although I think there was—in fact, as I recall the prosecution's testimony on that, the evidence tending to show the disobedience of the order was that Levy said I'm not going to train you and the person went on his way. In other words, it was very short. There was no additional presentation to that individual of the statements concerning our involvement in Viet Nam as I understand it. R. Vol. 5, 891.

But in the pure speech charges, the Government sought to prove that Dr. Levy's statements—allegedly made with a design to promote "disloyalty" and "disaffection"—were made to "divers personnel" which included Special Forces personnel and "everybody to whom the statements were made." *Id.* Allowing the Government to attempt to prove two conflicting fact situations,[27] each used to establish a separate crime, was

[27] This fact, of course, underscores the contrariness of the whole [footnote continued on next page]

error in light of the motion to sever. *Williams v. United States*, 168 U.S. 382 (1897); *Pointer v. United States*, 151 U.S. 396, 403 (1894).

In his dissent Circuit Judge Seitz resurrected a lower standard, requiring proof that the joinder "substantially prejudiced Captain Levy's constitutional right to a fair trial on the Article 90 charge." Jurisdictional Statement Appendix, p. 85a. However, the correct test is that of *Kotteakos* employed by the majority.[28] This Court no longer searches the record for actual prejudice. Rather, it looks first to see if the practice complained of is inherently prejudicial, and if so, the inquiry goes no further. In *Estes v. State of Texas*, 381 U.S. 532, 543 (1965), Mr. Justice Clark expressly said that the Court had rejected the actual prejudice test.

> In [*Rideau v. State of Louisiana*, 373 U.S. 723 (1963) and *Turner v. Louisiana*, 379 U.S. 466 (1965)] the Court departed from the approach it charted in *Stroble v. State of California*, 343 U.S. 181 (1952), and in *Irvin v. Dowd*, 366 U.S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it.

The unjustified joinder of unrelated basically dup-

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prosecution. Accused of trying to create "disloyalty" and "disaffection," the Government proved that Dr. Levy—rather than trying to talk to the Aidmen—refused to have anything to do with them.

[28] Even the UCMJ requires only that the "error materially prejudices the substantial rights of the accused" to reverse an error of law. Article 59(a) UCMJ, 10 U.S.C. §859(a).

licitous charges[29] justifies the reversal for prejudice. *See e.g., Fahy v. Connecticut*, 375 U.S. 85 (1963); *Chapman v. California*, 386 U.S. 18 (1967).

V.

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE OF NUMEROUS CONSTITUTIONAL ERRORS IN THE COURT-MARTIAL OF DR. LEVY

Regardless of the correctness of the foregoing arguments, the judgment of the court of appeals should be affirmed because of other constitutional errors. *Swarb v. Lennox*, 405 U.S. 191 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970). These include (a) the failure to disclose to Dr. Levy's civilian and chief counsel the entire G-2 dossier and to permit full cross-examination of the special agent; (b) the failure to disclose to the defense the responses to the 450 questionnaires sent to Dr. Levy's patients; (c) the failure to disclose and to make an adequate check for information obtained by electronic eavesdropping. Additionally, the law officer

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[29] The Government argues, as if an unconstitutional conviction can somehow be cured by military practice, that reversal of the Article 90 charge would "be to require separate trials on charges that do not arise from the same transaction. That is not the procedure enacted by Congress. . . ." Jurisdictional Statement, p. 16. Of course, as the dissent noted, Rule 8 of the Federal Rules of Criminal Procedure demands severance of non-connected offenses. Jurisdictional Statement Appendix, p. 86a. And the President is to prescribe "[t]he procedure, including modes of proof . . . which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. §836. Despite the Government's argument, Congress has not provided for such joinder.

erred (a) in refusing to apply the "some evidence" test to permit the war crimes defense to go to the court; (b) in refusing to allow truth as a defense to the pure speech charges. Furthermore, the order itself was vague; the specifications were impermissibly vague and overbroad; the Army provided Dr. Levy none of the training it regularly provides other drafted doctors. There were numerous other errors and prejudices to Dr. Levy which arose from trial in the military forum which were raised at trial and thereafter. Included in these are due process and equal protection, right of compulsory process, and effective assistance of counsel questions arising from the following: (1) the career officer "venire" was selected by the general who ordered the court-martial and excluded non-career personnel, enlisted personnel, officers of the rank of captain and below, medical personnel and women and was subject to command influence; (2) the two-thirds verdict and the vote by the court on challenges for cause militate against the exercise of even the peremptory challenge allowed; (3) the same general appointed the investigating officer under Article 32 UCMJ, 10 U.S.C. §832, and the press was excluded from the hearing thereafter held; (4) the failure to grant a change of venue despite the atmosphere at Fort Jackson and the threat to a court member and others; (5) the inside position of the prosecutor (he administers oaths, accommodates the court, qualifies even the defense witnesses, issues even the defense subpoenas, etc.) which creates a "favored" role with the court; (6) the ubiquitous role of the staff judge advocate whose influence pervades the prosecution, and who in this case illegally served as an investigator. Article 6(c), UCMJ, 10 U.S.C. §806(c).

CONCLUSION

For the foregoing reasons, appellee respectfully submits that this Court should dismiss this appeal, or, in the alternative, affirm the judgment entered in this cause by the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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